without hearing his evidence. That is so extravagant an argument as not to merit a moment's consideration. As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, if in such circumstances as these, he preferred to apply for an order of certiorari to quash his conviction, the court should be debarred from granting his application. It has been admitted by the justices that a mistake was made. This court is in a position to remedy that mistake by making an order of certiorari to quash the conviction, and that is the order which this court should make."

We were also referred to a passage in the Fourth Edition of Administrative Law by H.W.R. Wade at pages 36 to 38 which we find most illuminating. The relevant portion is reproduced hereunder:—

"Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to uphold the rule of law. The basis of judicial review, therefore, is common law. This is none the less true because nearly all cases in administrative law arise under some Act of Parliament. Where the court quashes an order made by a minister under some Act, it will normally use its common law power to declare that the Act did not entitle the minister to do what he did.

Where the proceeding is an appeal, some superior court or authority will reconsider the decision of some lower court or authority on its merits. ...

Judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not."

In *Anisminic* v. *Foreign Compensation Commission*[5] Lord Pearce in dealing with the general jurisdiction of the courts in the administration of justice in Britain said:—

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.";

and further down on the same page:—

"The courts have, however, always been careful to distinguish their intervention whether on excess of juridiction or error of law from an appellate function. Their juridiction over inferior tribunals is supervision, not review.

'That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise' (*Rex* v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, 156).

It is simply an enforcement of Parliament's mandate to the tribunal. If the tribunal is intended on a true construction of the Act to inquire into and finally decide questions within a certain area, the court' supervisory duty is to see that it makes the authorised inquiry according to natural justice and arrive at a decision whether right or wrong."

We would therefore allow this appeal, set aside the order of the court below, and grant the application for leave. Costs to be costs in the cause.

Deposit to the appellant.

Appeal allowed.

Solicitors: *Michael Chen & Lee*

CHIOW THIAM GUAN v. SUPERINTENDENT OF PUDU PRISON & THE GOVERNMENT OF MALAYSIA and Connected Appeals

[F.C. (Wan Suleiman, Salleh Abas and Abdul Hamid F.JJ.) August 18, 1982 & April 30, 1983]
[Ipoh — Federal Court Civil Appeals Nos. 204-208 of 1982]

Administrative Law — Application for declaration that mandatory sentence of death under Internal Security Act unconstitutional and for stay of execution — Claim struck out as disclosing no cause of action — Application for stay of execution pending appeal — Jurisdiction — Criminal Procedure Code, ss. 281 & 300 — Courts of Judicature Act, 1964, s.57(3) — Federal Constitution, Article 42.

Internal Security — Whether sentence of death under Internal Security Act unconstitutional.

Jurisdiction — Mercy, not subject of legal rights — Court has no jurisdiction to hear such matter.

In these cases the appellants had been convicted in the High Court for offences under the Internal Security Act, 1964 and sentenced to death. Their appeal to the Federal Court had been dismissed and the Pardons Board

had duly considered the sentences imposed and had not seen fit to interfere. The appellants in each case applied *inter alia* for (a) a declaration that the mandatory sentence passed under the Internal Security Act was unconstitutional and (ii) stay of execution pending finalisation of the proceedings.

In the High Court the claim was struck out on the ground that it disclosed no cuase of action. The appellants thereupon applied for stay of execution pending appeal to the Federal Court.

Held, the courts are without jurisidiction to deal with this sort of application for the reason that mercy is not the subject of legal rights. Any stay of execution would only be an extension of the prerogative of the Yang di Pertuan Agong in accordance with article 42 of the Federal Constitution.

Cases referred to:

(1) *Tait* v. *The Queen* (1962) 108 C.L.R. 620.
(2) *Gouriet* v. *U.P.W.* (H.L.(E)) [1978] A.C. 435, 490.
(3) *Jairam Das* v. *Emperor* A.I.R. 1945 P.C. 94, 95, 96.
(4) *Sarat Chandra* v. *Khagendranath* A.I.R. 1961 S. C. 334, 336.
(5) *De Freitas* v. *Benny* [1976] A.C. 239, 247.
(6) *Law Kiat Long* v. *Pardons Board, Johore* [1968] 2 M.L.J. 249.

FEDERAL COURT.

Karpal Singh (*Ngeow Yin Ngee* and *Lee* with him) for the appellants.

Tan Sri Abu Talib bin Othman, Attorney-General, (*Lim Beng Choon*, Senior Federal Counsel with him) for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering Judgment of the Court): The appellant who was under sentence of death applied by way of Notice of Motion for an order of stay of execution pending the hearing and finalisation of the appeal he had lodged in this Court on the sole ground that the death sentence is unconstitutional.

The notice of motion was filed on August 13, 1982, for hearing on August 18, in contravention of Rule 70(3) of the Rules of this Court which requires that the notice be served not less than 7 days before return date, but on Encik Karpal Singh applying for leave to give shorter notice and on the learned Attorney withdrawing his preliminary objection, we allowed the hearing to proceed on the application proper.

The appellant had on July 26, 1982 filed a Statement of Claim in which he sought, *inter alia* for (i) a declaration that the mandatory sentence of death passed on him on January 21, 1981 under the provisions of section 57(1) of the Internal Security Act, 1960 (Revised 1972) is unconstitutional and (ii) stay of execution pending finalisation of the proceedings.

Hashim Yeop A. Sani J. (as he then was) granted an application filed by the Attorney General under Order 18 Rule 19 of the Rules of the High Court 1980 to strike out the claim on the ground that it disclosed no cause of action. The same judge also set aside the order of stay he had himself granted on July 27, 1982.

As to what happened thereafter, we were referred to the affidavit of Encik Ngeow Yin Ngee, one of the solicitors representing the appellants. It would appear that at the conclusion of proceedings on August 12, 1982, Encik Karpal Singh applied for stay of execution pending appeal to this Court, but the learned Judge indicated that such application should be made to the Federal Court, hence the present application.

In support of his application Encik Karpal Singh cited a High Court of Australia decision *Tait* v. *The Queen*[1]. There, a petition was presented to the Supreme Court of Victoria seeking an inquiry under section 111 of the Mental Hygiene Act 1958 into the sanity of a prisoner under sentence of death for murder. The petition was dismissed.

Independently of these proceedings an application was made on behalf of the prisoner to the judge who had presided at the trial for an order that the execution of the sentence be respited. The judge held that he had no power to make the order sought. On the dismissal of the petition, the petitioner appealed to the Full Court of the Supreme Court which dismissed the appeal. The petitioner applied for special leave to appeal to the High Court from the judgment of the Full Court and the prisoner applied for special leave to appeal from the order of the trial judge.

When the motions came on for hearing the court ordered that they be adjourned and made a further order in the following terms:

"That the execution of the prisoner fixed for tomorrow morning be not carried out but he stayed pending the disposal of the applications to this court for special leave and of any appeal to this court in consequence of such applications and that the Chief Secretary and the Sheriff and his deputy or deputies be restrained accordingly."

The learned Attorney however contends that this court has no jurisdiction whatsoever to hear an application such as the present one. Jurisdiction, he adds can only be conferred by law. Each of the appellants had been tried in a High Court, and their appeals had been dismissed by this court. The Pardons Board had duly considered the sentences imposed, and had not been fit to interfere with these.

We were then invited to consider the provisions of section 281(d)(i), (ii) and (iii) and section 300 of the Criminal Procedure Code, which are as follows:–

s.281(d)(i) – on receiving the copy of the said order the Court shall cause the effect of the same to be entered in records of the court, and when the said order directs the sentence to be carried out shall appoint the time when it is to be carried out and shall endorse the time so appointed upon the said order, and shall in all cases cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary;

(ii) – the Ruler of the State acting in accordance with the provisions of Article 42 of the Constitution may order a respite of the execution of the warrant and afterwards appoint some other time or other place for its execution;

(iii) – the warrant shall be directed to the officer in charge of the prison for the district where the sentence is to be carried into effect, who shall carry the sentence into effect, in accordance with law;

s.300 (i) When any person has been sentenced to punishment for an offence the Ruler of the State (acting in accordance with the provisions of Article 42 of the Constitution) in which the offence was committed or in which the conviction was had may at any time, without conditions, or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(ii) Whenever an application is made to a Ruler for the suspension or remission of a sentence the Ruler may require the convicting Judge or Magistrate to state his opinion as to whether the application should be granted or refused and such Judge or Magistrate shall state his opinion accordingly.

(iii) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Ruler by whom it was granted, not fulfilled, the Ruler may cancel such suspension or remission: whereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer without warrant and remanded by a Magistrate to undergo the unexpired portion of the sentence.

(iv) Nothing herein contained shall be deemed to interfere with the right of the Ruler of any State to grant pardons, reprieves, respite or remissions of punishment.

The application for stay, submits the learned Attorney, should be made to the Pardons Board which alone is empowered to order a respite of the execution of the warrant of execution at this stage.

This recourse to the civil jurisdicton of this court as regard to sentences imposed at criminal trials has, he submits a parallel in the well known recent case of *Gouriet* v. *U.P.W. (H.L.(E))*[2] where Viscount Dilhorne said (at page 490) – "The criminal law is enforced in the criminal courts by the conviction and punishment of offenders, not in the civil courts. The jurisdiction of the civil courts is mainly as to the determination of disputes and claims. They are not charged with responsibility for the administration of the criminal courts."

He went on to say that under section 57(3) of the Courts of Judicature Act, 1964 in the case of a conviction involving sentence of death, a notice of appeal results in a stay of execution, but the appeal against conviction and sentence in each of the cases which form the subject matter of these applications has been dismissed the conviction and sentence having in each instance been affirmed so that the subsection no longer applies.

Referring to passages in *Jairam Das* v. *Emperor*[3] wherein it was held that where on an appeal from acquittal, a person was convicted, the High Court, after signing the judgment convicting the accused was *functus officio*, and thereafter had no power to release him on bail unless special leave to appeal was granted, the learned Attorney contends that similarly here only the Pardons Board is competent to allow stay of execution, this court being *functus officio*.

By way of analogy he cited the Indian Supreme Court decision in *Sarat Chandra* v. *Khagendranath*[4] wherein a passage from *Weater's* "Constitutional Law" is cited with approval and which reads thus:–

"A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. "The judicial power and the executive power over sentences are readily distinguishable," observed Justice Sutherland. "To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment."

We are of the view that a passage from the Privy Council decision in a Trinidad and Tobago case, *de Freitas* v. *Benny*[5] cited to us is particularly apt. It reads:

"Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the example of a purely discretionary act as contrasted with the exercise of a quasi-judicial function."

In this country the prerogative of mercy is vested in His Majesty the Yang di Pertuan Agong.

We also agree with the learned Attorney that we cannot, in any case grant an injunction to restrain the 1st respondent from carrying into effect a sentence in regard to which a warrant has been directed to him under section 281(d)(iii). See *Law Kiat Long & Ors.* v. *Pardons Board Johore*[6]

Courts are indeed without jurisdiction to deal with this sort of application for the reason so neatly set out in the *de Freitas case* – "Mercy is not the subject of legal rights. It begins where legal rights end." Any stay of execution would be only an extension of the prerogative of mercy, exercisable only by His Majesty the Yang di Pertuan Agong in accordance with Article 42 of the Constitution.

This application was accordingly dismissed.

Application dismissed

Solicitors: *Karpal Singh & Co.; Ngeow & Co.*

LEONG AH WENG v. NEOH THEAN SOO & ANOR.

[F.C. (Raja Azlan Shah L.P., Mohamed Azmi & Abdoolcader F.JJ.) April 12 & May 7, 1983]

[Penang – Federal Court Civil Appeal No. 167 of 1982]

Practice and Procedure – Action for possession of land – Consent order – Lease granted for fixed term – No order for possession in consent order – No application for consequential order – Application for writ of possession – R.H.C. 1980, O. 43 r. 3(1)(a).

In this case the respondents brought an action against the appellant for possession of land leased to him. The appellant joined issue on the claim but at the hearing a settlement was reached and a consent order made. The consent order provided that the respondents would grant a lease of the land to the appellant from March 16, 1978 and expiring on September 15, 1981. The appellant failed to give possession of the land on the specified date of its expiry. The respondents applied for leave to issue a writ of possession and this was granted by the learned Judicial Commissioner in the High Court. The appellant appealed. They appealed that the consent order did not contain an order for possession nor was any order for possession applied for.

Held: there were no order for possession on the expiry of the lease which is a prerequisite for its enforcement by a writ of possession as required by Order 45 rule 3(1)(a) of the Rules of the High Court 1980, and the learned Judicial Commissioner therefore could not and should not have given leave to issue a writ of possession in this case.

Cases referred to:

(1) *Fritz* v. *Hobson* (1880) 14 Ch. D. 542, 561
(2) *Societe des Etains de Bayas Tudjuh* v. *Woh Heng Mining Kongsi* [1978] 2 M.L.J. 267, 270
(3) *Sungei Biak Tim Mines Ltd.* v. *Saw Choo Teng & Anor. (No. 2)* [1970] 2 M.L.J. 226, 227
(4) *E.F. Philips & Sons Ltd.* v. *Clarke* [1970] Ch. 322

FEDERAL COURT.

W.S.W. Davidson for the appellant.
Lim Kean Chye and *T. Rajamoorthy* who did not appear below, for the respondents.

Cur. Adv. Vult.

Abdoolcader F.J. (delivering the Judgment of the Court): A consent order can at times veritably be *a pons asinorum* and this appeal illustrates the pitfalls in any temerarious resort to the enforcement of a compromise of an action by a consent order without thought to its form, substance or entailment.